

Draft Six-Month Progress Report from MAFAC's ESA Working Group

May 2013

Preface: At the May 6, 2013 meeting of the ESA Working Group, members approved this final progress report. In the same meeting, members reviewed the draft work product of a matrix summarizing the timing, pros, and cons of various options for improving communication with Councils during ESA Section 7 reviews. This work-in-progress-matrix differs in some details from the options listed in the progress report and remains fluid as the ESA Working Group discusses the feasibility of various options.

I. Formation of the Working Group and Development of Terms of Reference

- In January 2012, the Council Coordinating Committee (CCC) identified the two goals of improving collaboration, and identifying options for improving communication and increasing transparency in the ESA jeopardy determination process for fisheries management actions.
- In May, 2012, the CCC and MAFAC requested establishment of a joint working group (working group) to make recommendations on increasing transparency and improving confidence in ESA consultations on fishery management plans.
- In October 2012, NMFS established a Working Group composed of 4 Council Members, 4 MAFAC Members, and 3 NOAA Fisheries Staff.
- ***The Terms of Reference define the purpose of the Working Group: Convene a working group under the authority of the Marine Fisheries Advisory Committee (MAFAC) to increase confidence in the science and process used for Section 7 consultations under the Endangered Species Act (ESA) on Magnuson-Stevens Fishery Conservation and Management Act (MSA) fishery management actions.***
- The Working Group helped to organize and participated in a webinar held on October 24, 2012. The webinar presented different case studies that highlighted best practices and potential areas for improvements in ESA consultations on MSA fishery management actions.

II. Prioritization

The Working Group Developed Priorities for Discussion and Areas of Agreement and Disagreement during January 2013

- In January working group members responded to a survey indicating areas of agreement and disagreement and high priority topics for discussion.
- Areas of highest agreement:
 - Protected Resources should coordinate with Councils early in the development of FMPs

- Protected Resources discussions with Councils should begin early, before formal consultation begins
- We should determine the best timing for Protected Resources to share information about fishery impacts with Council and Sustainable Fisheries and the best timing for Council and Sustainable Fisheries to share information with Protected Resources about special features of the fishery
- Protected Resources should discuss “Best Available Information” with the Council early in the process to identify data weaknesses strategies to address these weaknesses.
- Areas of majority agreement:
 - Protected Resources should communicate a “Jeopardy Bar” to Councils and SF early in the process with clear guidance on actions that would meet the “no jeopardy” standard.
 - Strive for stakeholder understanding of data and analysis methods used in the biological opinion.
 - Review NOAA 2005 Draft Operating Guidelines for suggestions on consultations related to fishery management guidelines
 - Clarify the legal and regulatory constraints on communication between Protected Resources and Councils during consultation
 - Consider using consistent data sources and analyses for single Protected Species that occur across several regions
 - Define standards and levels of “Best Available Data” used in Biological Opinions.

III. Meetings and Meeting Notes

- An initial face-to-face meeting with a subset of Working Group Members was held the morning following the Webinar in October 2012. Since then, there have been three conference call meetings (January, February, March) and one face –to-face meeting (May). The following paragraphs summarize the concepts preliminarily identified as potential options, and include comments about potential effectiveness. It is important to note that more formal information is being developed to follow-up on these concepts in the form of a comparative matrix. Before recommendations can be finalized, it will be necessary to develop more specific information about how and whether these concepts would work and/or under what circumstances they would be available.

A. Options Proposed and Discussed for Early Informal Consultation

- Issues raised by Working Group Members
 - PR’s formal consultation and Biological Opinion (BiOp) comes pretty late in the process.
 - Formal Protected Resources (PR) consultation begins once the Council chooses a preferred alternative.
 - However, Councils want to know which alternatives will avoid jeopardy before choosing a preferred alternative.

- Communication about protected species among Sustainable Fisheries (SF), Council, and PR during the development of alternatives in Fishery Management Plans (FMPs) will increase the likelihood that the action will avoid jeopardy.
- Draft options for early, informal consultation among SF, Councils, and PR, under discussion
 1. SF as Action Agency includes Council in informal discussions with PR during development of alternatives. ESA Section 7(a) 1 and 7(a) 2 are times when an action agency can engage with the Office of Protected Resources (PR) to develop alternatives.
 2. SF as Action Agency designates Council as a Non-Federal Representative, which allows Council to engage in early conversation with PR about alternatives. Non-federal Representatives are often the entities responsible for preparing NEPA documents, already a Council role. SF as Action Agency and Council as Non-Federal Representative can assist PR in developing the draft Biological Assessment (BA) or NEPA document allowing major protected species issues to be worked out at the same time that alternative actions are being shaped. Councils could be designated as a Non-Federal Representative for a particular fishery.
 3. PR staff participate in Interdisciplinary Plan Teams (IPT) for FMPs. The Southeastern Regional Office uses this model. PR, SF, and Council are kept in the communication loop and can prevent problems later in the FMP process. On the IPT, PR can exchange information on the effects of various alternatives on protected species prior to the Council selection of a preferred alternative. However, PR staff are time and resource limited, and participation in early discussions for every amendment may not be feasible. When an alternative action is likely to affect a protected species, PR should be included as early as possible. However, sometimes the Council rewrites alternatives very late in their FMP process requiring new analysis of effects on protected species and the potential for jeopardy. New England and Mid Atlantic Councils have planning teams, but the role of the PR staff appears to be more limited in these regions. The 2005 Draft Operational Guidelines call for Fishery Management Action Teams that would include SF, Council, and PR. The recent Department of Commerce Inspector General Report on Fisheries calls for NMFS to finalize the Draft Operational Guidelines.
 4. Each Council and regional SF office could identify specific points in their FMP Amendment process when regional PR staff would be brought in for informal consultation and discussion of potential alternatives.
 5. ESA regulations set out a process for early consultation and preliminary Biological Opinions.
 6. 2005 Draft Operational Guidelines proposed a "Consultation Assessment" process – a formal written memo that summarizes analyses and preliminary conclusions that will form the basis of a Biological Opinion.

B. Options Proposed and Discussed for Council Participation During Formal Consultation

- Issues Raised by Working Group members.
 - When the need for formal PR consultation, BiOp, and Reasonable and Prudent Alternatives (RPAs) is based on new biological information or settlement of litigation, there is no clear process for including the Council in the consultation. Lacking a defined

process, there have been instances where Council science and management expertise has been sidelined, leading to animosity among Council, SF, and PR – entities that should work collaboratively.

- The lack of direct involvement of the Councils in the ESA Section 7 consultation process can result in an inefficient and inconsistent application of the ESA to actions proposed by the Councils under the MSA.
- The lack of Council integration into the ESA Section 7 can result in the Council and PR having different understanding and expectations regarding the choice of Best Available Scientific Information for the basis of the BiOp.
- A process that includes the Council in formal consultations could improve the overall efficiency of the consultation and evaluation processes under the ESA, MSA, and National Environmental Policy (NEPA).
- In the absence of the early informal consultation methods described above, the Council may choose a preferred alternative action that creates jeopardy for a protected species.
- The jeopardy determination will be based on the BiOp, and the Council and its science advisory committee (SSC) will want assurance that the BiOp is based on Best Available Scientific Information.
- The Council can provide management expertise in deliberations about RPAs, if they become necessary.
- Formal consultations sometimes involve USFWS in addition to PR.
- Draft options for Council involvement in formal consultations under discussion by the Working Group
 1. A draft option has not yet been developed for including Council expertise in formal consultations that arise outside of normal FMP development (from litigation settlements or new biological information).
 2. Councils could become an Action Agency during the formal consultation. As an action agency, the Council could work more directly with SF and PR to develop more integrated biological assessments and National Environmental Policy Act (NEPA) documents, to review draft biological opinions, and ultimately, to develop fishery management actions that comply with the MSA, ESA, and NEPA. However, Department of Justice (DOJ) and NOAA General Counsel (NOAA GC) maintain that the Council is not the Action Agency. This protects the Council and Council members from litigation that challenges FMP amendments.
 3. Councils could be designated as Applicants during the formal consultation. Applicants can submit information for consideration in the consultation, have to concur when timelines are extended beyond 60 days, can review the draft Biological Opinion (BiOp) and provide comments through the Action Agency, can provide expertise on Reasonable and Prudent Actions (RPAs), and get a copy of the final BiOp. However, NOAA GC does not consider Councils eligible to be Applicants.
 4. SF could choose to solicit public involvement through the Council process when developing comments on draft BiOps. If SF were to do this, it would likely require a time extension for the consultation. The ESA Consultation Handbook allows the Action

Agency (SF) to support participation of a party that may not fit the definition of an applicant and states that PR should try to work with that party.

C. *Options Proposed and Discussed for a Data Quality Rating Scale for Biological Opinions*

- Potential advantages and disadvantages discussed by the Working Groups of a scale to rate quality of Best Available Scientific Information used in Biological Opinions.
 - PR staff currently follows statutory standards and the Data Quality Act for information used in the Biological Opinions. PR uses a hierarchy when they seek and use information. Professional scientific judgment is used if there is conflicting or competing information. PR uses published information and may use unpublished data or other information that is available (such as monitoring data) and then submits its draft BiOp to a Quality Control(QC) process to ensure it meets “Best Available Scientific Information” standard.
 - The Working Group is discussing whether standards to rate quality of evidence used in the BiOp would improve transparency and credibility. Data quality models used in medical research may be adapted for use in BiOPs. However prescribing a rigid scoring of data quality may be problematic.
 - PR staff are sometimes required to develop BiOps for protected species with limited published knowledge. In these situations a data quality model might indicate that the best science was of low quality. Nevertheless, PR staff would need to produce a BiOp based on limited knowledge, while acknowledging data limitations. Sometimes a better-understood surrogate species can be used in the BiOp analysis. Early acknowledgement by SF and PR that a surrogate species will need to be used will be helpful to all parties.
 - Consistent application of a data quality evaluation could highlight particular research needs for particular protected species. This would signal research priorities to NOAA and other research enterprises and, over time, improve scientific knowledge of protected species.
- What are the draft options for a scale to rate quality of Best Available Scientific Information used in Biological Opinions?
 - Options are still being developed by the Working Group.

D. *Note that a comparative matrix is being developed to more thoroughly describe the options for council involvement. The full details of these options are still being developed and the feasibility of these options has not been reviewed with the necessary parties.*

Plans and next steps

- Discuss progress report and draft options with MAFAC, CCC, and NOAA Fisheries in early May, 2013
- Integrate new ideas and comments from MAFAC, CCC, and NOAA Fisheries into draft options.
- Add detail to options and review feasibility with necessary parties.
- Develop recommendations.

- Schedule additional conference calls for July and August.
- Final report with recommendations in October 2013.

Appendix 1. ESA Working Group Draft Matrix
Options for Improving Communication with Councils during ESA Section 7 Review

Goal: Improve communications among SF, PR, and councils during ESA section 7 consultations

Note: The working group agrees that the best long-term solution needs to incorporate early coordination of MSA, NEPA, and ESA activities. This matrix is focused only on the ESA components.

Technique	What it does	Timing	Pros	Cons	Additional Considerations
Council Involvement Prior to initiation of formal consultation					
1. Early Involvement: Interdisciplinary Plan Team ESA 7(a)(1), (2)	Early communication and coordination. Representatives from SF, PR, and Council work together on a team drafting documents in support of developing recommendations	Ongoing participation of Councils from initiation of action through submission of FMPs and implementing regulations for Secretarial review.	Early exchange of information	Extra work in terms of providing information on potential impacts as alternatives develop and are modified. Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.	

Technique	What it does	Timing	Pros	Cons	Additional Considerations
2. Technical Assistance / Not formalized ESA 7(a)(1)	Early communication and coordination by request and as time allows. Representatives from SF, PR, and Council work together during early planning stages to support development of alternatives considering ESA resources. Identify information needs and potential issues prior to consultation.	Throughout MSA FMP Process up to initiation of Informal or Formal Consultation	Continual Exchange of Information. No formal teams	Indirect participation in Drafting Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.	
3. Technical Assistance / Formalized ESA 7(a)(1)	Early communication and coordination under established framework (Roles and Responsibilities) and scheduled meetings. Representatives from SF, PR, and Council work together during all planning stages to support of development of alternatives considering ESA resources. Identify information needs and potential issues prior to consultation. Meet outside of planned	Throughout MSA FMP Process up to initiation of Informal or Formal Consultation	Continual Exchange of Information. Formal Mechanism with designated Points of Contact.	Indirect participation in Drafting; Will require additional staff time and resources Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.	May require dedicated staffing similar to establishing liaisons for FMP/Councils.

	actions to leverage lessons-learned through adaptive management approach				
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Technique	What it does	Timing	Pros	Cons	Additional Considerations
<p>4. Early Involvement: PR liaison to each FMP</p> <p>ESA 7(a)(1) – (4)</p>	PR assigns staff to serve as liaison, attend Council meetings, exchange information about fisheries and protected species	Throughout MSA process. Ongoing PR participation/attendance at Council meetings to share information about protected species impacts and to monitor developing fishery management actions	Dedicated Biologist for FMP Actions; Real-time expert advise and feedback during Council Meetings	<p>Time consuming and not always necessary.</p> <p>Manpower/ Time Intensive, Expensive</p> <p>Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.</p>	May require dedicated staffing similar to establishing liaisons for FMP/Councils
Techniques for Council Review of Draft BO					
5. Council Status: As Action Agency or as a "co-lead" or "cooperating" agency along with SF.	If the Council is an action agency, then it is required to consult with PR to insure that its actions will not cause jeopardy.	Formal consultation would be initiated at Council's request, or at the joint request of SF and each Council	This would provide the Council with direct communication with PR regarding the action on which the Council is consulting (presumably the action would be development of a management recommendation).	"Action agencies" have various duties and responsibilities for compliance with various laws. Action agencies can be held accountable in court, which can lead to fees, discovery, document production requirements, burdens on staff, and sanctions. In addition, it is not clear whether NOAA GC	This may not be legally possible in the absence of Congressional intent that Councils be treated as action agencies for purposes of ESA or other statutes. Previously, when councils have been listed as codefendants with NMFS, NOAA has succeeded in having them removed from the

				<p>would represent them or they would have to obtain separate legal counsel.</p> <p>It is not clear what type of communication the Council and PR would have with SF during consultation on the Council's action.</p> <p>SF would remain responsible for compliance with the ESA as SF would be the action agency for purposes of implementing regulations/issuing permits. This could result in 2 sets of consultations.</p>	<p>lawsuit. Council costs and vulnerabilities associated with being defendants in litigation should be considered here.</p> <p>Because of the requirement that Council meetings be public, the same consideration regarding waiver of privilege for draft biological opinions applies.</p> <p>The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.</p>
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Technique	What it does	Timing	Pros	Cons	Additional Considerations
6. Council Status: As Applicant	<p>SF would determine whether the Council is an applicant and how the Council as applicant would participate in the consultation. The ESA regulations provide certain procedural protections to applicants such as allowing them to provide information, participating in the development of RPAs, reviewing a draft upon request, and providing comments back through SF, and concurrence in extensions.</p> <p><i>Applicant</i> refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.</p> <p>50 CFR 402.02</p>	Recognition of a Council as an applicant could occur upon the request of a Council. Effects of the special status designation would occur during formal consultation.	Applicants would not be subject to the same litigation risks as action agencies (as described above in option 5).	<p>This would be similar to option 4 above (sharing of draft BO) with the addition that applicants have certain rights in the process, such as the right to participate in the development of the BO, and any terms and conditions associated with it. However, applicant communication with the consulting agency (PR) must be channeled through the action agency (SF) unless the applicant is also designated as a non-federal representative (see below).</p> <p>NMFS and FWS may have some overarching concerns about expanding the use of this provision and precedent for other parties to seek similar treatment.</p>	<p>SF, as the action agency, determines whether a party is an applicant. If it has not already done so, SF should provide input into NMFS' determination on this point.</p> <p>Even if SF does not determine Councils to be applicants, the Consultation handbook states that SF may still cooperate with non-applicants, and in that case, PR should as well.</p> <p>The issue of confidentiality of council documents would exist here. It is not clear how councils would be able to take any meaningful action on draft documents outside of a public process; if the Council discussed or considered the documents during public meetings, any applicable privileges</p>

					<p>would most likely be waived. .</p> <p>The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.</p>
Technique	What it does	Timing	Pros	Cons	Additional Considerations
7. Council status: As non-federal representative	<p><i>Designated non-Federal representative</i> refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment. See 402.08.</p> <p>50 CFR 402.02.</p>	<p>Designation of a Council as an a non-federal representative could occur upon the request of a Council, prior to the development of a DEIS. Thereafter, the Council could engage in informal consultation with PR (with involvement of SF) to develop a.</p> <p>Considerations as an applicant would also provide a Council with the ability to have input into the development of a BO based upon the content of the BA.</p>	<p>Non-Federal Representatives would not be subject to the same litigation risks as action agencies (as described above in option 5.</p> <p>Non-fed rep status would allow the Council to work directly with PR to engage in informal consultation during the development of proposed fishery management and would also help expedite development of a non-jeopardy BO by NMFS.</p>	<p>Potential for additional time added to consultation process unless a Council develops a clear working relationship with PR and SF. This relationship could be memorialized in an MOU identifying roles and responsibilities.</p> <p>NMFS and FWS may have some overarching concerns about expanding the use of this provision and precedent for other parties who don't have the MSA-based duties of councils, to seek similar treatment.</p>	<p>The issue of confidentiality of council documents would exist here. It is not clear how councils would be able to take any meaningful action on draft documents outside of a public process; if the Council discussed or considered the documents during public meetings, any applicable privileges would most likely be waived. .</p> <p>The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.</p>

Technique	What it does	Timing	Pros	Cons	Additional Considerations
8. During Formal Consultation: Sharing of Draft BO with Council regardless of regulatory status of Councils under ESA	SF can request a copy of a draft BO, and may share it with the Council regardless of regulatory status of Councils under ESA	This would occur after the Council selects a preferred alternative and formal consultation has begun. Section 7 consultation cannot begin until there is a sufficiently identified proposed action. Once consultation begins, ESA regs provide for a 90-day consultation period, followed by a 45 day period for drafting the BO, for a total time period of 135 days after the action agency requests initiation and provides a description of the proposed action. These periods can be extended, and most consultations are typically longer than 135 days. Sharing of the draft BO would occur late in the 45-day drafting period. Thus, this would be late in the process for modifying Council recommendations and attempts to solicit meaningful Council and/or public comment would be likely to significantly extend the timing of completion of the BO.	Could give Councils an opportunity to see what PR is thinking – how data are being interpreted. Would allow Councils to assist in development of proposed action, Reasonable and Prudent Measures, and a Reasonable and Prudent Alternative if the actions cannot be tailored to avoid jeopardy.	Would occur late in the process, and could slow down completion of the fishery management plan or action or the BO.	<p>While this approach would not accomplish as much coordination as early communication and frontloading techniques, it might be appropriate in certain situations, such as cases in which there is no corresponding Council process in which to frontload.</p> <p>Sharing a draft BO most likely affects assertion of privilege for the document. Due to MSA requirements for public meetings with only limited opportunities to close meetings, it is not clear how a council could consider and discuss a draft BO without treating it as a public document.</p>

Technique	What it does	Timing	Pros	Cons	Additional Considerations
Technique for providing clear roles throughout the process					
<p>9. Overarching MOU Approach:</p> <p>An MOU between SF and a Council could specify the SF's and the Council's respective roles in a consultation.</p>	<p>An MOU between SF and each Council could clarify relationships under the MSA and provide for designated roles and responsibilities pertaining to ESA compliance.</p> <p>This could be combined with an SF decision to share draft BOs and treat "as if" an applicant under option 4 above. And/or development of special terminology to describe unique roles and importance of councils under the law in fishery management process.</p> <p>The MOUs could be done individually for each region/council pair either on a general basis for particular actions. Further discussion is</p>		<p>Customized MOUs could both recognize the unique roles of councils under the MSA and avoid unintentional consequences of attempting to apply existing regulatory status that may not be a perfect fit – generating risk of both adverse litigation and adverse precedent setting for other parties.</p>	<p>An untested procedure could present legal vulnerabilities.</p>	<p>The issue of confidentiality of council documents would exist here. It is not clear how councils would be able to take any meaningful action on draft documents outside of a public process; if the Council discussed or considered the documents during public meetings, any applicable privileges would most likely be waived.</p> <p>The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.</p>

	recommended to determine who all should be parties to the MOU – at least SF and the Council, potentially to include PR as well, or have a separate policy agreement between SF and PR.				
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